

STATE OF MICHIGAN
COURT OF APPEALS

DERRY LADON PETTY,

Plaintiff-Appellant,

v

CHRISTINA NICOLE ARNOLD,

Defendant-Appellee.

UNPUBLISHED

November 10, 2015

No. 327507

Jackson Circuit Court

Family Division

LC No. 03-006896-DP

Before: GADOLA, P.J., and HOEKSTRA and M. J. KELLY, JJ.

PER CURIAM.

Plaintiff-father appeals as of right a March 16, 2015 order granting defendant-mother's motion for sole physical custody of the parties' minor child. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On September 16, 2002, mother gave birth to the parties' minor child. Although evidence suggests mother and father were living together at the time, shortly after the child's birth, father moved out of the home and, with mother's consent, took the child with him. On December 17, 2003, father petitioned the trial court for an order of filiation establishing his paternity over the child. The trial court found that father was the child's biological father and issued an order granting him custody of the child and giving mother visitation rights. On July 12, 2012, mother filed a motion seeking sole custody, alleging that father no longer wanted to live with the child. The Friend of the Court (FOC) investigated the matter and recommended that the parties share joint legal custody of the child, while father maintain sole physical custody. On January 14, 2013, the trial court issued an order adopting the FOC's recommendations.

On April 11, 2014, mother filed a motion seeking sole physical custody of the child. Mother alleged that father physically and mentally abused the child and that the child was unhappy living with father. The FOC conducted an evidentiary hearing on mother's motion on September 2, 2014. On October 31, 2014, the FOC recommended that the trial court dismiss mother's motion because there was insufficient evidence of changed circumstances to warrant review of the court's January 14, 2013 custody order. On November 20, 2014, mother objected to the FOC's recommendations and proposed order. In her objection, mother alleged that on October 22, 2014, father and the child were involved in an altercation that led to a charge of domestic assault against the child. Mother explained that since the altercation, the child had been living with her. Father also objected to the FOC's recommendations and proposed order.

The trial court held an evidentiary hearing on mother's April 11, 2014 custody motion on February 25, 2015. At the hearing, father testified that on October 22, 2014, he became angry when the child came home late. According to father, he grabbed the child, pushed her onto the ground, and got on top of her. The child reacted by punching father and throwing a can and a frying pan at him. Father said his mother witnessed the events and called the police after the child attempted to grab a knife. Father and mother agreed that since the incident, the child had been living with mother.

On March 16, 2015, the trial court ordered that father and mother maintain joint legal custody over the child, but awarded mother sole physical custody. In its opinion and order, the court first found that the October 22, 2014 altercation between father and the child and the fact that the child no longer lived with father constituted a change of circumstances significant enough to warrant review of the court's January 14, 2013 custody order. Next, the trial court found that the child had an established custodial environment with both parents and that granting mother sole physical custody was in the child's best interests.¹

II. STANDARD OF REVIEW

With regard to custody, "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. We review findings regarding the existence of a change of circumstances under the great weight of the evidence standard. *Corporan v Henton*, 282 Mich App 599, 605; 766 NW2d 903 (2009). "Under this standard, a reviewing court should not substitute its judgment on questions of fact unless the factual determination 'clearly preponderate[s] in the opposite direction.' " *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010), quoting *Fletcher v Fletcher*, 447 Mich 871, 878; 526 NW2d 889 (1994) (alteration in original).

III. DISCUSSION

Father first argues that the trial court erred in granting mother sole physical custody of the parties' child because there was no proper motion for custody modification pending before the trial court. Father's argument lacks merit. On April 11, 2014, mother filed a motion for change of custody, seeking sole physical custody of the parties' minor child. Following an evidentiary hearing, on October 31, 2014, a referee recommended dismissing mother's motion for insufficient evidence demonstrating a change of circumstances. The referee advised the parties of their right to object and seek judicial review of the recommendations. Mother and father both filed written objections to the referee's recommendations in November 2014. The trial court then scheduled an evidentiary hearing for February 25, 2015, to address the parties' objections. The court did not accept the referee's recommendations or sign the proposed order.

¹ On March 26, 2015, father filed a joint motion for reconsideration and relief from judgment, which the trial court denied.

Therefore, mother's April 11, 2014 custody motion was still properly before the trial court when it issued its March 16, 2015 order granting mother sole physical custody of the minor child.²

Father next argues that the trial court erred in conducting an evidentiary hearing on custody before finding that a change of circumstances had occurred. The Child Custody Act, MCL 722.21 *et seq.*, requires a party seeking a change in custody to first establish a change of circumstances. Specifically, MCL 722.27(1)(c) provides that when a child's custody is governed by an order of the circuit court, the court may "[m]odify or amend its previous judgments or orders for proper cause shown or because of change of circumstances." The moving party "has the burden of proving by a preponderance of the evidence that either proper cause or a change of circumstances exists *before* the trial court can consider whether an established custodial environment exists . . . and conduct a review of the best interest factors." *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003). To establish a change of circumstances, "a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed." *Id.* at 513. If a proper cause or change of circumstances does not exist, "the trial court may not hold a child custody hearing." *Corporan*, 282 Mich App at 603-604. A trial court has discretion to decide whether an independent hearing is necessary to determine whether there are changed circumstances. *Id.* at 608-609. When facts alleged to constitute a change of circumstances are undisputed, a trial court may accept those facts as true. *Vodvarka*, 259 Mich App at 512.

In this case, the trial court was permitted to hold an evidentiary hearing on the child's custody because there was a significant change of circumstances. In her objection to the referee's recommendations and proposed order, mother thoroughly outlined the events of the October 22, 2014 altercation between the child and father and stated that the child had been living with her since the incident. Father admitted that the altercation occurred and that the child lived with her mother after the event. Father cites no authority, and we are not aware of any, that required the trial court to hold a separate hearing on the threshold inquiry of changed circumstances, or to explicitly state its conclusions on the issue before conducting the custody hearing. In its opinion and order, before addressing the child's established custodial

² Father insinuates that the trial court erroneously granted mother's custody motion because he was not given notice that the February 25, 2015 hearing would address custody and therefore lacked the opportunity to call sufficient witnesses. This issue is not properly before this Court because father did not include it in his statement of the questions presented or support his position with citations to authority. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). In any event, the record clearly indicates that on January 23, 2015, the trial court properly mailed notice to father's address of record stating that the February 25, 2015 hearing would address "CUSTODY & SUPPORT (FROM OBJECTION)S FILED BY BOTH PARTIES)." See MCR 2.107(C). Moreover, father stated in his reconsideration motion that he wanted to call the same witnesses "that testified on his behalf at the FOC hearing." The trial court was permitted to, and in fact did, review the testimony of these witnesses before issuing its March 16, 2015 custody order. See MCR 3.215(F)(2).

environment or best interests, the trial court stated that the October 22, 2014 altercation and the fact that the child began living with mother after the incident constituted a significant change of circumstances warranting review of the January 14, 2013 custody order. We agree that the altercation and ensuing change of residence had a significant effect on the child and that the trial court's finding regarding the existence of changed circumstances was not against the great weight of the evidence. See *Pierron*, 486 Mich at 85. Therefore, the trial court did not err in holding a custody hearing or in reviewing its previous custody order.

In reaching this conclusion, we find no merit in father's argument that because the October 22, 2014 altercation and the child's change of residence occurred after mother's April 11, 2014 motion, the trial court could not consider those facts when making a determination regarding changed circumstances. In assessing whether a change of circumstances exists, courts consider any conditions arising "since the entry of the last custody order." *Vodvarka*, 259 Mich App at 513. In this case, the last custody order was dated January 14, 2013. As such, the trial court was permitted to consider evidence regarding the altercation and the child's new living arrangement. MCR 3.215(F)(2).

Affirmed.

/s/ Michael F. Gadola

/s/ Joel P. Hoekstra

/s/ Michael J. Kelly